IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No. 492

NAHUM BIRNBAUM, M. J. LUTTERMAN, co-partners comprising a partnership under the name and style Birnbaum & Co., BIRNBAUM AND CO., a co-partnership, consisting of Nahum Birnbaum and M. J. Lutterman, JAMES A. COLE, and CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee, etc.,

Petitioners,

vs.

CHICAGO TRANSIT AUTHORITY, et al.,

Respondents.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals, Seventh Circuit.

REPLY OF PETITIONERS TO BRIEFS OPPOSING CERTIORARI.

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ARGUMENT.

May It Please the Court:

Statement.

All argument to the contrary notwithstanding, the indisputable fact remains that if remedy is denied these petitioners, no one will ever know from an Illinois court

what Illinois intended when she permitted Chicago to pass the ordinance of 1907. *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478, will be ignored and it will never "appear that rights in local property of parties to this proceeding have—by the accident of Federal jurisdiction—been determined contrary to the law of the state which in such matters is supreme" (Black, J., 309 U. S. 478, 484).

Illinois will never be accorded the opportunity of saying that when she passed a legislative act permitting her city to induce persons to invest their money on the faith of the ordinance, that she meant that the terms of the ordinance should be abided and that persons who violated same should be liable therefor. Illinois should be permitted to pass upon Illinois matters. If Kansas construes Kansas wills (*Scott* v. *Gillespie*, 103 Kan. 745, 176 P. 132, certiorari denied 249 U. S. 606, cited with approval in the *Thompson* case, 309 U. S. 484), why shouldn't Illinois construe Illinois contractual ordinances (*Chicago City Ry. Co.* v. *Chicago*, 323 Ill. 245, 252)? And when a municipality of Illinois by ordinance induces persons to invest their funds on the ordinance assurance, an attempt by those persons later to have the city's liability under the ordinance and that of a person coming within its terms (neither of whom are bankrupts) settled by an Illinois court should not be labeled "an attack on the integrity of the federal judicial process" (C. T. A. Br. 34).

We are not attacking anyone's integrity. Neither do we like ours attacked. We are trying to protect what interests our clients have left after investing $16,000,000.00 upon the faith and integrity of the ordinance with its "bizarre value formula" (C. T. A. Br. 31). We wonder how "bizarre" it looked in 1907. Then the ordinance was

considered a method of assurance to investors who invested in reliance thereon. In a calmer moment, it manifested a "clear intention to provide assurance *legally obligatory upon the City* for the protection of the investment" (*Harris Trust & Savings Bank* v. *Chicago Rys. Co.*, 39 Fed. (2d) 948, 960; Orig. Br. 43, 44). Now we must ignore those investors "because the people residing in the Metropolitan area of Chicago, acting through Chicago Transit Authority, have acquired the transportation lines in reliance upon the orders and decisions of the federal courts. The Authority, and the City should not be harassed by nuisance suits which seek to relitigate issues that have been argued and disposed of repeatedly in the course of reorganization proceedings" (C. T. A. Br. 13). Illinois is to be denied the right to decide Illinois questions, persons not debtors in the federal court are to have their liability under Illinois law composed and extinguished by the simple device of a federal court injunction! Not so much as a lawsuit in the state court will these later investors allow the former ones, so important is it that the investment of the later ones be protected.

The reorganization is now a *fait accompli*. It can now be ignored and forgotten. The fact that we are still trying to preserve our clients' rights makes hollow characteristic, intemperate remarks of the opposition like the following: "Was it only coincidence that they waited until the day before consummation to file their notices of appeal? The answer, of course, is that they are primarily concerned with blocking the plan. No other conclusion can be reached after considering the tactics they adopted" (C. T. A. Br. 26, 27); "it was becoming apparent that petitioners were trying to prostitute the appellate processes of the federal courts" (C. T. A. Br. 28).

The reorganization was carried on with utter disregard to the question of the right of an Illinois court to pass upon liabilities arising under Illinois law. Regardless of anything that has or can be said, the fact remains that no resort to any Illinois court was had to determine whether persons who relied upon the faith and integrity of the ordinance were parties to the contract created thereby or third party beneficiaries thereof (Orig. Br. 17) and the liability of the City or anyone who violated that ordinance to those persons. What Illinois meant by that ordinance was of no concern then and appears to them to be of no concern now. Is this court going to decide that we are trying to make "the fantastic assumption that the City of Chicago (which in the first place obviously would have no power to do so) guaranteed the B bondholders that they would get their money back in full even if the company became insolvent" (C. T. A. Br. 30) by denying this petition? Is this court going to now decide the matter in parenthesis, namely that the City obviously had no power to be a guarantor under the ordinance by denying this petition? In fact, the ordinance was specifically held not to be an *ultra vires* act of the City in *Venner* v. *Chicago City Ry. Co.*, 236 Ill. 349, 359, 361. Is this court going to decide that "the *Parrett* case (346 Ill. 252) and the law of third party contracts obviously does not apply to the 1907 ordinance" (C. T. A. Br. 32)? Is this Court going to accept quotations from Williston (C. T. A. Br. 32, 33) able and authoritative as he is, as the Illinois law of third party contracts? Are any of these questions federal questions? Couldn't Illinois decide them? And if she did, wouldn't the federal courts be bound to follow the decision?

Were all of those questions decided in the reorganization proceedings? And if they were, did the federal court

have jurisdiction to decide them? Obviously they must have been decided and the court must have had jurisdiction to decide them if the broad, sweeping injunctive order is valid. That's what this case is about. It isn't about the reorganization. We were cut out of that. The functions and purposes of that proceeding were to compose and extinguish the liability of the person or persons who tendered their estates to that court—not the estate of someone else. The court's sole jurisdiction there was to determine whether we could get any part of our $16,000,000.00 from that bankrupt. It held that we couldn't. We are now trying to get it from someone else. Could it jurisdictionally hold that we *couldn't even* try to get it from that someone else?

Respondents have much to say about these questions having been previously decided (C. T. A. Br. 2, 3, 6, 7, 8, 11, 12, 16, 20, 21, 22, 23, 24, 31; B. C. Br. 1, 2, 3, 5, 9, 10, 12); nothing about the jurisdiction of the court to decide them. Our argument on jurisdiction and the authorities cited (Orig. Br. 38-45) are noted on page 30 of the Transit Authority brief as inapplicable on the question of diversity of opinion among the Circuit Courts of Appeals—ignored as to the jurisdictional question. The other brief ignored the question completely. Not one case is cited in either brief showing that a federal court jurisdictionally could decide these questions.

As to whether these questions were previously decided, respondents are content to ignore the fact that if we had been permitted to have in the record on appeal those matters called for by our designation it would have shown that Judge Igoe had refused specifically to find that these questions presented by the instant appeals had been previously decided. He refused to find that the instant pe-

titions were "for rehearing of objections which the petitioners heretofore have made to the plan of reorganization heretofore approved and confirmed and to the order of sale heretofore entered herein, and presents matters heretofore heard and adjudicated by this court and by the courts of appellate jurisdiction, and the same should be denied" (R. 69, 70). This fact alone exposes the Achilles heel of respondents' argument. It would have been further apparent that if the other matters called for by our designations had been in that record, that this question had never been and could not have been decided (R. 70). Why, the ordinance upon which our claim is based wasn't in the record although it was attached to the petitions when filed in the District Court. Properly a part of the petitions, it was not incorporated in the short record on appeal.

Furthermore there was nothing in that short record on appeal to indicate that the matter had been previously decided. The attempt to urge that question was based upon unverified assertions in the emergency motion to dismiss. Do those statements become part of the record on appeal? Can I by a motion in the case add matters to the record not appearing in the record as transmitted by the Clerk of the District Court? My motion can be based only upon matters in the record on appeal as called for by the Rules of Civil Procedure, not upon unverified assertions in the motion. Otherwise why file a record at all?

The foregoing observations should place in greater relief the fact that respondents not only ignored our designation of record in making up their short record, but, to support their position here they indiscriminately endeavor to incorporate in this record on appeal the following:

(1) The unverified alleged factual statements contained in the emergency motion to dismiss (R. 55).

(2) The appeals from the order of sale. (It would have been simple to have incorporated that in the short record here and it is not unreasonable to assume that if those appeals presented the same questions respondents would have done so, Judge Igoe to contrary notwithstanding) (C. T. A. Br. 16; B. C. Br. 5).

(3) The efforts of Chicago Transit Authority to market its bonds and the result (C. T. A. Br. 9).

(4) Petitioners' certiorari petition to this court to review the order affirming the District Court's approval of the plan (C. T. A. Br. 21).

(5) Petitioners' suggestions in opposition to the motion to dismiss the appeal from the order of sale (C. T. A. Br. 22).

Now all in the world that the short record on appeal actually contained was:

(1) The instant petitions (R. 2, 19).

(2) Petitions to set claims for hearing (not involved here at all) (R. 35).

(3) Orders denying instant petitions (R. 42, 44). (These they didn't transcribe properly as they showed on their face that Judge Igoe refused to hold the petitions ones for rehearing, etc., R. 69, 70.)

(4) Orders denying petition re claims (R. 43; not involved here at all).

(5) Notices of Appeal (R. 45, 46, 47).

(6) Appellees' joint designation of record (R. 48).

(7) Certificate of Clerk (R. 51).

On the face of it that record couldn't conceivably have been sufficient to warrant a dismissal, much less support the arguments contained in respondents' brief in opposition here.

Within the narrow limits of a reply, it is impossible for us specifically to call attention to the repeated assertions

in both opposing briefs unsupported by the short record. They pervade almost every page of those briefs. Note the absence of record references in their statement of the case (C. T. A. Br. 4-11). We here assume that our rights are as important as the rights of persons not parties to these proceedings (C. T. A. Br. 34). Furthermore, we are not seeking to compel the City and the Transit Authority "to pay $100,000,000 more than the plan purchase price" (C. T. A. Br. 34), if the effect of the decision is apposite. We are merely seeking to recover the $16,000,000 we never would have invested if we had known that the ordinance could be ignored and the City and any violator thereof escape liability in a bankruptcy proceeding in which neither was a debtor (C. T. A. Br. 34).

It is said that $75,000,000 has been paid for these properties and in effect that no more should be paid (C. T. A. Br. 34). If this be important, perhaps the full story should have been told, namely, that the Transit Authority, when it sold its $105,000,000 of bonds (B. C. Br. 3), represented in its prospectus to "the bond buying public," who now "should not be harassed by nuisance suits" (C. T. A. Br. 13), that the value of these properties was $171,384,169, the ordinance price as of January 31, 1945 (R. 8, 9), computed according to "its bizarre value formula!" The date of this prospectus was July 10, 1947 (R. 8)!

With these prefatory observations, we pass to a consideration of the substance of the opposing briefs. Inasmuch as the brief of the Bondholders' Committees (B. C.) is merely a restatement of that of the Chicago Transit Authority (C. T. A.), we will reply to contentions of Respondents as set out in the C. T. A. Brief. Neither brief makes any attempt to specifically answer our argument

in the order set forth in our brief; but instead, the C. T. A. brief argues five points:

I. The court did not err in dismissing the appeals because:
   A. The orders were not reviewable;
   B. Petitioners had no equity in the Debtor;
   C. Petitioners' contentions had been decided adversely to them on prior appeals.

II. The short record contained every item the court needed to pass upon the motion to dismiss.

III. Because the appeal was filed the afternoon before the day of the sale, the court was justified in dismissing it within twenty-four hours.

IV Petitioners' reasons for *certiorari* are based on a misconstruction of their authorities and on a complete misconception of the reorganization proceedings involved.

V. The City and the Transit Authority should not be harassed by nuisance suits raising matters previously determined.

In this reply, we ignore Point V entirely except in so far as we have previously commented in this statement.

Returning to the Points of our argument, we next point out how the respondents have failed to answer to them.

I.

The Circuit Court of Appeals Erred In Dismissing The Appeals For The Reason That It Had Not Acquired Jurisdiction To Do So.

An Appellate Court does not acquire jurisdiction to dispose of an appeal until there has been observed the necessary steps upon which its appellate jurisdiction is premised or there has been a failure to observe same.

By way of answer to this point of our argument (Orig. Br., p. 30), respondents say that the short record was sufficient because it "contained every item needed to pass upon the motion to dismiss" (C. T. A. Br. 23—Point II), and that it was an exact compliance with Rule 75(j). Nowhere do they answer our argument that, where there is on file an appellant's designation of record and statement of points, Rule 75(j) must be read with Rule 75(g) and that, when so read, "a copy of such portion of the record or proceedings below as is needed for that purpose," as such words are used in 75(j), means "the designations or stipulations of the parties as to the matter to be included in the record; and any statement by the appellant of the points on which he intends to rely," as stated in Rule 75(g). Rule 75(g) further provides that "the matter so certified and transmitted constitutes the record on appeal" (Orig. Br. 33). Rule 75(g) is a command to the Clerk of the District Court that any designation and statements of points shall be certified as a part of the record. (Pet. Br. p. 30.) Rule 75(j) does not say that an appellee moving for dismissal can ignore an appellant's designation and statement of points on file when such appellee's designation was filed.

Unanswered is our argument that the observance of

these procedural steps was essential to the acquisition of jurisdiction by the Circuit Court of Appeals. (Orig. Br. 30-34.)

We have heretofore pointed out (p. 7) specifically that the short record did not show "that the appeals were from non-appealable orders" (C. T. A. Br. 23). It did not show "that the issues raised had been decided against them on prior appeals (C. T. A. Br. 23). These are the so-called "incontestable grounds" set forth in the emergency motion to dismiss. Obviously, that unverified motion could not augment the short record. It stood or fell upon that record.

All that the short record showed was that petitions to modify and relax an injunctive order had been filed, that orders had been entered denying same (but a true copy of the orders was not in the short record), that timely notices of appeal had been filed from clearly appealable orders (*Re Nine North Church St.*, 82 F. (2d) 168; Orig. Br. 49) that appellees (respondents) had filed a designation of short record, and that the Clerk of the District Court had certified to "a true and complete transcript of the proceedings had of *record made in accordance with the designation of Record on Appeal filed by the Appellees*" (Rec. 51).

Of this short record, respondents say, "Taking those documents, together with their knowledge of their own decisions on the former appeals, the judges, two of whom had heard both former appeals, had everything in the way of a record on which to determine the motion to dismiss" (C. T. A. Br. 24) because it is fundamental that an Appellate Court may take judicial notice of its records on prior appeals between the same parties in the same cause."

Therefore, the argument runs, the record plus the judicial notice which the court could take of its own records was such that "no additional parts of the record could possibly have avoided the unanswerable reason for dismissal" (C. T. A. Br. 24).

This argument is in the teeth of that very court's decision in *Paridy* v. *Caterpillar Tractor Co.*, 48 F. (2d) 166, where, it was unsuccessfully contended that in passing upon a motion to dismiss the Court was justified in taking judicial notice of a decree in a former case claimed to have decided the point at issue. Speaking for that Court, Judge Sparks (one of the judges here) said:

> "The decree in the former suit was, by reference, made a part of appellee's motion to dismiss, but we assume it was not attached to the bill as it does not appear in the record before us (pp. 167, 168)"
>
> "It is true that a court will take notice of its own records, but it cannot travel for this purpose out of the record related to the particular case; it cannot take notice of the proceeding in another case, even between the same parties and in the same court, unless such proceedings are put in evidence" (citations). In absence of evidence to that effect, the reviewing court cannot take judicial notice that a case before the court had connection with one formerly decided by it (p. 168)".

Obviously this is sound doctrine, for otherwise on certiorari to this Court, how could this Court know from the record the matters of which the Court of Appeals took judicial notice, and whether it erred in deciding the question, even assuming that it had the right to take such judicial notice.

Besides being invalid, their argument ignores the point raised, namely, jurisdiction to proceed (Orig. Br. 30). The

point here involved is whether, on a motion to dismiss under Rule 75 (j), there can be ignored an appellant's designation of record and statement of points on file when an appellee's designation is filed in making up the record on appeal. Jurisdiction does not depend upon the correctness or incorrectness of the result.

The question is not whether the Court had everything in the way of a record in other cases on which to determine the motion, but rather whether it had jurisdiction to determine the motion at all. The record does not even show what other records the court may have actually had. How could the court judicially know what appellants' claim was without their statement of points? Is an appellee to be permitted to determine the issues upon which the appeal is to be decided (Orig. Br. 33)?

Furthermore, the Circuit Court of Appeals did not have everything in the way of a record needed to determine the motion. Actually, they did not have a correct record because if the orders denying the petitions had been correctly transcribed they would have shown that Judge Igoe had actually deleted in ink the proposed findings incorporated therein to the effect that the petitions were *"for rehearing of objections" previously* made and that they presented "matters heretofore heard and adjudicated by this Court and by the Courts of appellate jurisdiction, and that the same should be denied" (R. 69, 70). Now, if those petitions embodied matters which Judge Igoe knew he had never decided, and in respect of which the District Court refused to make findings as requested by respondents, when and by what authority did the Circuit Court of Appeals decide them?

For this summary procedure, respondents rely solely upon Rule 75 (j), (C. T. A. Br. 25) and assumed records

in other cases. Unless that subparagraph (j) is read with subparagraph (g) of the same rule, (Orig. Br. 33) so that the matters called for by an appellant's designation and his statement of points are incorporated in the record, then an appellant is powerless to pose the issues on appeal, he is powerless to prevent an appellee from determining what the record shall contain, and he is powerless to have the case determined on the appellant's record and statement of points rather than upon a record and issues determined exclusively by an appellee. We say that a Court of Appeals cannot jurisdictionally decide an appeal in this manner.

II.

In Dismissing The Appeals, The Circuit Court of Appeals Denied Petitioners Due Process Of Law Contrary To The Fifth Amendment To The Constitution Of The United States.

Respondents attempt to answer this part of our argument (Orig. Br. 34-37) by their Point III to the effect that because our appeal was filed on the afternoon before the day set for the consummation of the plan, and because it was groundless yet "likely to upset or at least indefinitely postpone consummation," there was justification for dismissing it within 24 hours (C. T. A. Br. 26-28).

This argument answers itself. It presumes that the Court was justified in acting upon matters not in the record but upon matters contained in an unverified motion and which averred not facts but probabilities (R. 55). To appease the vagaries of the bond-buying public and their counsel, petitioners, proceeding in accordance with the Rules of Civil Procedure to effect appeals, are to be deprived of their rights under those Rules and have their appeals dismissed within 24 hours from the time they file

notices of appeal! Because of those vagaries, their counsel are to be served with notice and motion for dismissal within an hour from the time they filed notices of appeal, they can stay up until 2:30 a. m. preparing objections to the motion, argue the matter upon the convening of court at 9:30 a. m. and then be confronted with the argument that they "did not controvert a single representation of fact that had been made in the emergency motion" and that "those facts are not controverted" (C. T. A. Br. 28).

What facts? Those apprehensions and alleged probabilities appearing in the "Emergency Character" of the motion to dismiss (R. 55, 56)? We thought we answered them in Objection 8 to the Motion (R. 70, 71).

If we didn't we will answer them now. What difference could the outstanding appeal have made to the question of the consummation of the sale? Those lawyers must have known that we were entitled to a petition for *certiorari,* if the decision be adverse. Might they not be reasonably apprehensive of that also? Furthermore, the petitions showed on their face that we were not attacking the Plan. How could we have blocked it? And by the way, whose rights should have been protected? Those of parties to the case or outside parties? As it was we filed the appeal before we had to. Counsel had worked day and night to get it ready (R. 97, 98) so that no one could say "that we stood idly by and let this sale go through without asserting our rights" (R. 99).

Actually, we were showing more consideration than is being shown us here when one has the temerity to argue that the interests and probable activities of persons not parties to the record are so vast and important as to justify the dismissal of an appeal within 24 hours from the time the notice of appeal is filed in the District Court!

We find our due process argument (Orig. Br. 34-37) unanswered by authority (C. T. A. Br. 26-28).

III.

The Circuit Court Of Appeals Erred In Sustaining The Emergency Motion To Dismiss The Appeals.

A.

The District Court did not have jurisdiction to issue an injunctive order restraining the prosecution of the suits contemplated by the petitions to relax and modify said injunctive orders.

No effort is made by respondents to specifically answer the jurisdiction argument. We claim rights not against the debtor, but against persons other than the debtor. *Diversey Bldg. Corporation,* 86 F. (2d) 456, and *Nine North Church Street, Inc.,* 82 F. (2d) 186 (Orig. Br. 38, 40), squarely holding that a bankruptcy court cannot extinguish or modify the obligations of persons not bankrupt in the proceeding, are said to be "not in point" (C. T. A. Br. 30). But nowhere do respondents cite any cases which hold that a bankruptcy court has jurisdiction tc extinguish or modify the liabilities of persons not debtors in the proceeding.

B.

The question of whether petitioners could prosecute a suit against the City of Chicago and the Chicago Transit Authority of the character contemplated by the petitions to relax and modify, had not been previously decided by the Court of Appeals in its decision affirming the District Court's approval and confirmation of the plan; and even if it was decided, being a question of jurisdiction of the subject matter, it could be reconsidered on a subsequent appeal.

Respondents attempt to answer this point under their Point IC (C. T. A. Br. 20). They say that we cannot

disguise the fact that our "claims have been passed on and rejected twice previously by the Circuit Court of Appeals and were urged once before in this Court without success" (C. T. A. Br. 20). That not appearing in the short record on appeal, respondents augment that record by quoting from petitioner's certiorari petition in this Court in the former case, and their objections to the other "emergency" motion to dismiss the appeal from the order of sale (C. T. A. Br. 21). Passing for the moment that Judge Igoe refused to find that the instant petitions were for rehearing of matters previously decided and following respondents outside this record to the briefs on the *certiorari* mentioned, it can there be conclusively demonstrated that their contention is invalid. *Infrequent it is that you can cite an opponent's brief to sustain your position, but that is the fact here.*

They say that if our contentions are sustained the plan would be disrupted completely, that instead of $75,000,000.00, the City of Chicago or the Transit Authority would have to pay some $172,000,000 for the properties and in bold face type they proclaim that:

> "Obviously the Circuit Court of Appeals could not have affirmed the approval and confirmation of the plan calling for a purchase price of $75,000,000.00 without necessarily holding that neither petitioners nor anyone else had a right to insist on a purchase price of $172,000,000.00" (C. T. A. Br. 20).

In the first place, we are not insisting upon a purchase price of $172,000,000.00. So that premise fails. We are asking for a determination of our contractual rights under the ordinance against persons other than the debtor. Further, the fact that respondents still think that we are insisting upon the ordinance price proves conclusively that only the question of ordinance price was involved in the

prior proceedings. This is further conclusively demonstrated on pages 13 and 15 of the brief of these same Bondholders' Committees in opposition to certiorari filed in this Court in the former case (*In Re Chicago Rys. Co.*, Oct. Term, 1946, Nos. 1200-1205).

That it was evident that all questions which might eventuate out of a case of this magnitude were not being then decided, particularly with reference to the liabilities of persons other than the debtor, is also conclusively illustrated on page 16 of that brief, wherein these Committees say:

> "If, as and when the Authority, armed with its franchise, undertakes a campaign to compete with the Surface Lines, these questions—which will be moot if the present plan succeeds—may be raised and faced in the State Courts of Illinois."

Now the question that they then said could be raised and faced in the State Courts of Illinois was whether the Transit Authority was a "licensee" or "another company" and thereby bring it within the provisions of the ordinance, *one of the questions which we are seeking by the petitions to raise in the State Court* (R. 27).

It is apparent that the Circuit Court of Appeals didn't pass on the questions raised by the petitions (Orig. Br. 45-47). It is further apparent that the District Court had jurisdiction to reorganize the debtor, it had jurisdiction to order its properties sold and its liabilities extinguished and nothing in any ordinance could preclude it from so doing. If persons other than the debtor became liable by reasons of its so doing under the 1907 ordinance contract, of what concern was that to the Court? Those persons hadn't tendered their estate to that Court. And it is further obvious that that is all that was done in the reor-

ganization proceedings. It had no right to nullify liabilities of others than a debtor under an ordinance, contract or otherwise; its sole jurisdiction was to modify and extinguish the liabilities of the debtor and reorganize, here by sale, its assets.

And even if we proclaimed to the skies that we had "an *in personam right* against the City and the Transit Authority" (C. T. A. Br. 21) what relevancy did it have in the reorganization of another? The question there was what *"in personam right"* did we claim to have against that other. And when one considers how carefully the Circuit Court of Appeals handled the question (Orig. Br. 46): "all contingent rights of the debtor pass to its trustee," it is clear that it wasn't considering our rights against persons other than the debtor but those of the debtor alone. Particularly is this true when the injunctive order here sought to be relaxed was not entered until about two months after that opinion was filed (Orig. Br. 46).

And since respondents urge the questions raised by the instant petitions were decided in the appeals from the order of sale which were summarily dismissed upon motion, why not incorporate those proceedings in this record so that these petitioners might know, and this Court might know on certiorari, whether those appeals involved the same questions involved here (*Paridy* v. *Caterpillar Tractor Co.*, (C. C. A. 7) 48 F. (2d) 166, 167, 168)? How can this Court know the matters of which the Circuit Court of Appeals took judicial notice? Respondents made the motion for dismissal. They set forth this point in an unverified motion to dismiss (R. 63) unsupported by the short record filed. They were content to ignore the fact that the record in the District Court showed that Judge

Igoe had specifically refused to find (R. 69, 70) "the substantive questions raised by the petitions * * * were decided by this Court (C. C. A.) in its decision affirming the District Court's approval * * * of the plan and in the order dismissing the prior appeal from the order of sale" (Point II of the Emergency Motion, R. 63).

We here again note that any matters which the Circuit Court may have noted in other cases, cannot be a part of the record before this Court under its Rule 38(1). And all of this would have been more readily apparent if we had been permitted to bring up our record to the Circuit Court as appears from the companion case, namely, our motion for leave to file our petition for mandamus, contemporaneously filed with this petition for certiorari (Miscellaneous No. 259, Pet. 24-33), and brief filed in support of our motion for leave to file same (pp. 15, 16).

Our designation of record was set forth in the petition for *mandamus* in *haec verba* (Pet. 26-30. No. 10 of Part II of that designation called for the "Findings of Fact, Conclusions of Law and Order Approving plan, filed and entered Feb. 27, 1946." That was entered by Judge Igoe pursuant to Rule 52(a) of the Rules of Civil Procedure requiring the Court to "find the facts specifically and state separately its conclusions of law thereon" in actions tried without a jury, imported into bankruptcy practice by Order 37 of the General Orders in Bankruptcy and specifically applied to Chapter X proceedings by Rule 52(2) of this Court's Rules in Bankruptcy.

Judge Igoe knew that he had not previously found or decided the questions raised by the petitions in that Finding, Conclusion and Order, and if it had been incorporated in this record on appeal, it would have been apparent to the Circuit Court of Appeals that these questions were not

decided by Judge Igoe, as it is apparent therefrom. It requires no citation to support the statement that the Circuit Court of Appeals is limited in jurisdiction to a review of the matters decided below. It has no original jurisdiction. So if Judge Igoe had not decided these questions and he refused to find specifically that he had, how could the Circuit Court of Appeals have decided them? Since respondents have belabored this question so extensively in off-record references, is it unreasonable to infer that if this question was decided in that Finding, Conclusion and Order entered February 27, 1946, that they would have quoted the pertinent provision thereof?

And how can they successfully argue, without the citation of authority, that the question of what rights and liabilities are created by a local ordinance "was not a matter of State law but of federal bankruptcy law" (C. T. A. Br. 31), and that a decision of a federal court thereon would be binding upon the State court (*Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478, 484)?

Why don't they answer *Re Diversey Bldg. Corp.*, 86 F. (2d) 456 (Orig. Br. 38, 39), and *Re Nine North Church St., Inc.*, 82 F. (2d) 186 (Orig. Br. 40, 41), squarely in point on jurisdictional grounds?

And why don't they answer our argument that even if all these questions had been decided, the Court being without jurisdiction to decide them, "the question can be raised again for jurisdiction over the subject matter can be raised at any time and in any proceeding" (Orig. Br. 47).

C.

The orders appealed from were appealable orders.

Respondents say that the granting or refusal of a rehearing, being within the Court's discretion, is not the subject of appeal, and argue that the orders denying and dismissing the petitions to modify the injunctive order of sale were in effect the denial of a rehearing and therefore not appealable. They cite many cases (C. T. A. Br. 14-17). Conceding the legal principle, this is no case of rehearing.

Respondents' own record fails to support them and, in fact, supports us. All that it shows are the petitions and orders entered thereon. The fact that the petitions contain an extensive verified statement of facts (R. 2-34), suggests an entirely new set of facts, not heard when the injunction was entered. The orders, incorrectly copied into the record as we have pointed out do not, in any respect, suggest a rehearing.

To fortify this sort of record, respondents, in their emergency motion to dismiss, made unverified references to the orders approving and confirming the plan (not in the record), to the appeals from the order of sale (not in the record), and to the Circuit Court's decision affirming the plan, 160 F. (2d) 59, (R. 57-58; 61-63). Now the petitions to modify involved only petitioners' rights against the City and Authority, not their rights against the debtor. Actually, the orders approving and confirming the plan and the appeals from the order of sale would, if in the record, have shown that petitioners' rights against the City and Authority were not adjudicated in those proceedings, and that the appeals from the order of sale were not even considered on the merits, but were

dismissed upon motion in much the same way that the instant appeals were dismissed. And we have already pointed out how studiously the Circuit Court avoided consideration of those rights in its decision affirming the plan (Orig. Br. 46). Moreover, when it rendered that decision on January 4, 1947 (C. T. A. Br. 8), that Court could not have reviewed the order of sale, which was not entered until March 7, 1947 (C. T. A. Br. 7).

Had we been permitted to file our own record in the Circuit Court, we would have shown that the denial of our petitions was not a denial of rehearing, but that the District Judge actually heard those petitions upon their merits and specifically refused to find in the orders that the matters presented by the petitions had been previously adjudicated. The distinction, with respect to appealability, between an order denying rehearing and an order entered, like those at bar, upon a hearing on the merits, was defined by this Court in *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.*, 300 U. S. 131, 137-138, cited by respondents (C. T. A. Br. 15):

> "The granting of a rehearing is within the Court's sound discretion, and a refusal to entertain a motion therefor, or the refusal of the motion, if entertained, is not the subject of appeal. * * * On the contrary, the rule which governs the case is that the bankruptcy court, in the exercise of a sound discretion, if no intervening rights will be prejudiced by its action, may grant a rehearing upon application diligently made and rehear the case upon the merits; and even though it reaffirm its former action and refuse to enter a decree different from the original one, the order entered upon rehearing is appealable and the time for appeal runs from its entry."

How could the Circuit Court decide the appealability of these orders without giving us the opportunity to show

by the record, as we would have, that they did not deny a rehearing but were entered upon a consideration of the merits of matters not previously heard and were therefore clearly appealable? The record before the Circuit Court was inadequate to determine appealibility because of that court's failure to give us an opportunity to show their appealability by our own record. For this reason alone, appealability was no ground for dismissing our appeals and respondents' argument here is without merit.

Except for their rehearing argument, respondents seem to concede that Section 129 of the Judicial Code applies to the orders. Their objection is "not based on the interlocutory nature of the orders" (C. T. A. Br. 17). They distinguish the *American Grain* case (202 Fed. 202) only on the ground that a new state of facts is there shown. We want the opportunity to show, by our record, that our petitions presented a new state of facts and that the orders were appealable under Section 129. But assuming purely for argument that the orders in effect denied a rehearing, how can one escape the unqualified terms of Section 129 and the inexorable logic of Judge Sanborn in the *American Grain* case?

Respondents' cases under Section 129 used the term "rehearing" in one sense, the *American Grain* case in another sense, fixed by the facts of those cases. Respondents' cases (C. T. A. Br. 17) asked a complete dissolution of the injunctions there involved, raising the question whether there should be any injunction at all. In the *American Grain* case, in *Re Nine North Church Street Corp.*, 82 F. (2d) 186, and at bar, the question was not whether the facts justified injunctive relief. The question was whether, injunctive relief being warranted, the injunction did not exceed its adjudicated scope and impinge

upon matters which had not been a subject of the adjudication. The *American Grain* case, which respondents' cases recognize by distinguishing it, is sound and establishes our rights under Section 129.

We might briefly remark, in reply to respondents' argument on page 18, that nothing in the mandate of the Circuit Court affirming the plan required the District Court, by injunction, to extinguish rights not affected by the plan, namely, petitioners' rights against the City and the Authority.

And even if there were some question with respect to the appealability of these orders (which we do not concede) we were still entitled to a review on the merits of that question under well settled principles of appellate procedure rather than having those appeals summarily dismissed on motion (*Bennell Realty Co.* v. *Shinner* (C. C. A. 7), 87 F. (2d) 824, 826; *Halfpenny* v. *Miller*, 232 F. 113, 115; Orig. Br. 35).

D.

Petitioners have an interest in the subject matter of their appeals.

Levelling their lances at the same old windmill, respondents insist that because we have no equity in the debtor and cannot participate in the plan, we have no interests in our appeals (C. T. A. Br. 18-20). We stated in the Circuit Court (R. 88), in our opening brief (Orig. Br. 50), and we reiterate here that we claim no such equity or right to participate; and for that reason respondents' cases have no bearing upon our position here. But we do claim rights against the City of Chicago and Chicago Transit Authority whom the order of sale enjoins us from suing. Our appeals sought a relaxation of that injunc-

tion. Could our interest in the appeals be more apparent? We note with interest the following quotation by respondents from *In Re Michigan-Ohio Bldg. Corp.*, 117 F. (2d) 191, 193:

> "Speaking more specifically, a party has an appealable interest only when his property may be diminished, his burdens increased or his rights detrimentally affected by the order sought to be reviewed."

The orders denying our petitions to modify the injunction detrimentally affected our rights against the City and Authority. We sought a review of those orders, and we have an appealable interest.

IV.

The Circuit Court of Appeals erred in dismissing the appeals for the reason that the petitions presented a question of the prosecution of a suit under state laws against persons other than the debtor, which presented questions of the constitutionalty and construction of those state laws which, in the absence of authoritative state decision, should be left for decisions in appropriate proceedings in the state courts.

V.

The effect of the decision of the Circuit Court of Appeals is to ignore state decisions indicating the validity of the cause of action asserted, which decisions are binding upon the federal courts.

Respondents divert attention from these points by discussing them under their Point IV "Reasons for Certiorari" (C. T. A. Br. 28-33). We return to our points because we believe them to be of utmost importance in this case.

American Federation of Labor v. *Watson*, 327 U. S. 582; *Erie Railroad Co.* v. *Thompkins*, 304 U. S. 64; and *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478, are questioned (C. T. A. Br. 30-32). In citing these cases to support the proposition that the decision below is in conflict with the decisions of this Court, respondents say that we completely misconstrue the Circuit Court decision affirming the plan. They say that the Court

> "assumed the validity of the 1907 Ordinance (for the purpose of the discussion) but held that such a contingent 'right' to the Ordinance purchase price, if any existed, was the property of the debtor and could be dealt with in the reorganization proceedings. Thus, even assuming that decisions of this Court require that all laws must be construed by the state courts before the federal courts pass on them, the cases cited are not applicable because the decision here involved was not a matter of state law but of federal bankruptcy law" (C. T. A. Br. 31).

Observe the absence of any authority to support the statement.

Is the question, what rights and liabilities are created by a local ordinance, a matter of state law or federal bankruptcy law?

If the Illinois Court held that the ordinance created not only contingent rights in the debtor but also separate and independent rights to bondholders as parties to the ordinance contract or as third party beneficiaries thereof, could the Circuit Court of Appeals legally hold otherwise (Orig. Br. 51)?

If the Illinois Court held that we were direct parties to that ordinance contract or third party beneficiaries under *Parrett* v. *Carson, Pirie, Scott and Co.*, 346 Ill. 252 (C. T. A. Br. 32), would either Williston or the Circuit Court of Appeals control (C. T. A. Br. 32)?

And if the Illinois Court held that section 23 of the ordinance (R. 4) applied to the Transit Authority as a "licensee" or "another company," would a contrary decision of the Circuit Court of Appeals control?

And if it was considered necessary to the instant reorganization that the rights and liabilities of others than the debtor under the ordinance be determined, what was there to prevent "appropriate submission of the question • • • to the Illinois State Courts?" (Black, J., *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478, 484.)

Respondents claim that the *Magnolia* case is not applicable because the decision of local law was not necessary to carry out a plan of reorganization; whereas here it was necessary and therefore proper to construe the 1907 Ordinance before going forward with the plan. And, they say, the Court accordingly decided that any rights under the Ordinance belong to the debtor alone, thereby forming a basis for the injunction, so the argument goes (C. T. A. Br. 31).

Can they seriously contend that the question of whether the debtor railroad company owned the right of way in fee simple was not necessary to the carrying out of the reorganization plan of that debtor?

Can you reorganize a debtor without determining all of its assets?

The question in *Magnolia* was whether the debtor railroad owned the right of way in fee simple and hence the rich oil deposits beneath the surface. Could the Court have proceeded to reorganize that debtor without that question having been decided?

But they say that they do not believe this Court would apply *Magnolia* here because

"a decision of some kind, either holding the 1907 Ordi-

nance not to be a bar to reorganization (which was done) or invalid as tying the hands of the bankruptcy court forever, was absolutely essential before going forward with the plan" (C. T. A. Br. 31).

Can they claim that the bankruptcy court had jurisdiction to declare the Ordinance invalid?

Do they claim that the bankruptcy court had jurisdiction not only to hold the Ordinance no bar to reorganization, but also to hold that persons not debtors had no liability under that ordinance?

The *Magnolia* case means that where a local question is involved in a controversy within federal jurisdiction, local Courts must decide that question. Whether or not the local question here, our rights against the City and Authority under the 1907 Ordinance, had to be decided to carry out the plan is not important. If that local question had to be decided to conclude the reorganization proceeding, the federal courts had no jurisdiction to decide it, and should have referred it to the Illinois courts for decision. If that local question was not involved at all, *a fortiori* the federal courts had no jurisdiction to decide it. Actually the Circuit Court did not decide that question in its decision affirming the plan. But if it did, it had no jurisdiction to do so, under the foregoing authorities; and there was no basis for the injunction denying our rights against the City and Authority.

There was no jurisdiction to issue such an injunction because the question of our rights against the City and Authority had not been referred to and decided by the Illinois Courts. But going even further, *Harris Trust and Savings Bank* v. *Rys. Co.*, 39 F. (2d) 958, 960, and all of the Illinois decisions on the subject, *Chicago Rys. Co.* v. *Chicago*, 292 Ill. 190, 201, 202; *Chicago City Ry.* v. *Chi-*

cago, 323 Ill. 246, 254; and *Carson, Pirie, Scott & Co.* v. *Parrett,* 346 Ill. 252, 257, indicate that we do have rights against the City and the Authority. These are decisions on local law which are binding upon the Federal Courts. These decisions bring the instant injunction squarely within *In Re Diversey Building Corp.,* 86 F. (2d) 456, 457, 458, and *In Re Nine North Church Street, Inc.,* 82 F. (2d) 18, holding that a bankruptcy court is without jurisdiction to modify or extinguish liabilities of persons other than such debtor (Orig. Br. 39, 40, 41). The injunction here was issued directly in the teeth of all of the law upon the subject. This exposes the error in respondents' argument that no conflict with local decisions was involved (C. T. A. Br. 32).

But respondents argue that we are not third party beneficiaries, that our rights under the ordinance "are at most such remote interests as every bondholder might have in contracts in which his corporation is the promisee, • • • that the *Parrett* case and the law of third party contracts obviously do not apply to the 1907 Ordinance" because "it is fundamental to such a contract that performance move directly to the third party beneficiary" (C. T. A. Br. 32). Various quotations from Williston follow (C. T. A. Br. 32, 33). Is this Court going to decide those questions now by denying this petition?

Passing the non-federal character of these questions, a more typical example of at least a third party promise could scarcely be found. Petitioner Cole and his family held bonds of Chicago Traction. To induce him and others to participate in the 1907 reorganization, the Ordinance was passed. As we pointed out (Orig. Br. 16), the Ordinance was not to be effective unless and until he and others gave up their Chicago Traction securities and accepted the

Series B bonds and participating securities here involved. (This would be clearer if the ordinance was in the record.) That the Ordinance constituted a direct promise to him and those others is evident from its terms as Judge Wilkerson pointed out when he said that it manifested *"a clear intention* not only to provide terms and conditions covering the City's consent to the use of City streets during the grant but also *to provide assurance legally obligatory upon the City, for the protection of the investment"* (Orig. Br. 16). Now the ordinance has been repeatedly held to be a contract between the City and the Railways (*Chicago City Ry. Co.* v. *Chicago*, 323 Ill. 245). We claim also that it was a contract between the City and "those persons who gave up their security and took B bonds upon the faith of said ordinance" (Orig. Br. 17). That question has never been decided by any Illinois Court, but will be if the injunction is relaxed. But in any event it was passed for our direct benefit, and we acted in reliance thereon. From it we received the faith and assurance of the City. If we didn't receive that there was no purpose in its passage and no point in our tendering the securities we then had and accepting those we now hold.

Now the instant plan contemplated "a release of claims against the City of Chicago under any ordinance or otherwise, in consideration of the release by the City of certain claims against the trustees" (C. T. A. Br. 6). And now the claim is that that release to the City discharged any and all liabilities of the City under that ordinance contract and that the Court could jurisdictionally so declare. That this argument is unsound is clear from the very authority they cite, for in 2 Williston on Contracts (Rev. Ed.), pp. 1144, 1145, Sec. 397, *Discharge or variation of the promise — creditor beneficiary*, appears the following:

"The creditors' right is purely derivative, and if

> the debtor no longer has a right against the promisor the creditor should have none. A qualification is made in the Restatement of Contracts, 'A discharge of the promisor by the promisee in a contract or a variation thereof by them is effective against a creditor beneficiary if, (a) the creditor beneficiary does not bring suit upon the promise or otherwise materially change his position in reliance thereon before he knows of the discharge or variation, and (b) the promisee's action is not a fraud on creditors.' Comment a of the same section of the Restatement reads: 'The beneficiary is justified in relying on the promise and it is immaterial whether he learns of it from the promisor, the promisee or a third party. If there is a material change of position in reliance on the promise, the change of position precludes discharge or variation of the contract without his consent.'"

That we materially changed our position in reliance on the promise before the attempted discharge or variation of the ordinance contract and that we never consented thereto cannot be questioned. As a matter of fact, the promise here did not become effective until we had changed our position in reliance thereon (special conditions, Sec. 1(a)(e), Ordinance, not in record, but referred to, Orig. Br. 16).

But in spite of the foregoing and the absence of the Ordinance in the record, respondents say (C. T. A. Br. 33):

> "But in the 1907 ordinance the performance, if any, under Section 23, moved only to the promisee—Chicago Railways Co. Nowhere is there even a hint that any performance of any kind was to be rendered by the City of Chicago to the B bondholders."

If this were true, which it is not, of what value was the Ordinance to us? We gave up our investment, not Chicago Railways. We asked this same question beginning

on page 43 of the Original Brief, and the Court will observe that we received no answer.

Therefore, we respectfully submit that respondents have utterly failed to answer our Points 4 and 5.

Conclusion.

If one were to entirely ignore the procedural aspects of the appeal accorded petitioners, the fact remains that the effect of the injunctive order is to preclude petitioners under penalty of criminal contempt from determining in the State Court rights and liabilities created by a local ordinance. This is justified upon the premise that those rights and liabilities were determined in the reorganization proceeding. The effect of the alleged determination is to compose, extinguish or modify liabilities of persons other than the bankrupt—persons who never tendered their estate to the bankruptcy court. If this could be done, certainly respondents would cite authority, but they cite none. On the other hand, *Re Diversey Building Corp.*, 86 F. (2d) 456 (C. T. A. Br. 7), and *Re Nine North Church Street, Inc.*, 82 (2d) 186 (Orig. Br. 38, 40) specifically say that a person not a bankrupt "cannot modify his obligations by the reorganization of other insolvents" (Orig. Br. 39).

Further, *American Federation of Labor* v. *Watson*, 327 U. S. 582, 595, 596, says that the federal courts should refrain from passing upon questions of State law until the State Courts have had an opportunity to pass upon them, and *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478, specifically applies that doctrine to a bankruptcy case. *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, 80, teaches us that State Court decisions are binding upon the Federal Courts. Yet the effect of the injunction is to ignore State de-

cisions indicating the validity of the cause of action which petitioners desire to prosecute in the State Court. We search respondents' briefs in vain for the citation of any authority which invalidates our position in respect to the matters set forth in this conclusion.

Finally it is said that the case does not fall within Rule 38; that our sole basis for the petition is that we "disagree with the decision of the Circuit Court" and *Magnum Co.* v. *Coty*, 262 U. S. 159, 163, is cited (B. C. Br. 13). We answer by saying that rarely does a case present as many reasons for the invocation of this Court's jurisdiction (Orig. Br. 6, 7, 8). Specifically not one case is cited by them which holds:

(a) That the C. C. A. had jurisdiction to dismiss the appeal (Reasons for Allowance of Writ 1, 2, 8, Orig. Br. 6, 8);

(b) That we were not denied due process (Reasons 3, 4, Orig. Br. 6, 7);

(c) That the Court did not in fact by injunction extinguish or modify the liabilities of persons other than the bankrupt and thereby did not conflict with other decisions (Reason 5, Orig. Br. 7);

(d) That the questions which they claim were decided in the reorganization with respect to the rights and liabilities under the ordinance were federal and not local questions (Reason 6, Orig. Br. 7);

(e) That the questions which they claim were decided in the reorganization were not contrary to State decisions (Reason 7, Orig. Br. 8).

We again respectfully submit that the writ be granted.

Respectfully submitted,

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